

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CARLOS JAVIER AQUINO,
Petitioner,
v.
A. LOPEZ, warden,
Respondent.

No. C 10-4413 SI (pr)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS AND
DENYING CERTIFICATE OF
APPEALABILITY**

United States District Court
For the Northern District of California

INTRODUCTION

Now before the court for consideration is Petitioner Carlos Javier Aquino’s pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 concerning his 2007 conviction in Santa Clara Superior Court. For the reasons discussed below, Aquino’s petition and a certificate of appealability are denied.

PROCEDURAL BACKGROUND

On March 28, 2007, a jury convicted Aquino of the attempted murder of Anthony Felardo, assault with a deadly weapon on Armando Chapa, and shooting at an occupied vehicle. Clerk’s Transcript (CT) 239-50. On June 12, 2007, Aquino was sentenced to 25 years to life consecutive to a term of life in state prison. Reporter’s Transcript (RT) 568-71. Aquino appealed. On September 10, 2008, his conviction was affirmed by the California Court of Appeal. Ex. 3. He did not petition for review in the California Supreme Court. Aquino filed

1 a petition for a writ of habeas corpus in the Santa Clara County Superior Court. On December
2 11, 2009, in a written opinion, the Superior Court denied the petition. Ex. 4, In re Aquino, on
3 Habeas Corpus, No. CC503766 (Cal. Sup. Ct. 2009). He filed habeas petitions in the California
4 Court of Appeal and the California Supreme Court, which were summarily denied. Exs. 5, 6.

5 On September 30, 2010, Aquino filed a federal petition for a writ of habeas corpus. On
6 March 10, 2011, the Court issued an Order to Show Cause why relief should not be granted on
7 the claims of ineffective assistance of trial counsel and prosecutorial misconduct. On May 20,
8 2011, Respondent filed his answer and, on August 1, 2011, Aquino filed a traverse. The case
9 is now ready for review on the merits.

11 STATEMENT OF FACTS

12 The facts of the case were summarized by the California Court of Appeal as follows:

13 Anthony Felardo and Armando Chapa were heroin addicts who stole to support
14 their habits. They used runners to purchase heroin from their source. At some
15 point, Felardo asked a runner to introduce him to the source so he could deal with
16 the source directly. Defendant was the source. After making arrangements by
17 telephone, defendant drove a blue Chevy pickup truck to a rendezvous and met
18 Felardo. Felardo and defendant discussed heroin prices. When Felardo
19 mentioned that he would consistently buy a lot of heroin, defendant lowered his
20 price. When Felardo asked whether he could obtain heroin on credit, defendant
21 answered negatively and added that he would shoot Felardo if Felardo ever took
22 heroin without paying for it. Thereafter, Chapa called defendant or defendant's
23 brother, Omar, at a cell phone number when the addicts needed heroin. Defendant, in turn, would send runners or go himself to meet and transact with the
24 two. Once, Felardo and Chapa were at a place where defendant's runners were
25 selling heroin to others. They asked the runners for heroin on credit. The runners
26 refused, and an argument ensued. Felardo chased one of the runners to the
27 runner's car, drew a knife, and demanded heroin. The runner gave Felardo heroin
28 worth \$300. Two weeks later, Chapa was driving his car with Felardo as his
passenger. The two saw defendant drive past them in the blue truck. When Chapa
later stopped at a traffic light, defendant pulled up from behind and stopped to the
right about an arm's length from Felardo. Defendant had his left hand outside the
window. He then brought his right hand over, pointed a black 12-inch gun at
Felardo, closed one eye, and shot Felardo in the neck. The bullet exited and
lodged in Chapa's arm. The bullet paralyzed Felardo from the shoulder down.
Felardo has no hope to recover his neurologic function.

26 Ex. 3, People v. Aquino, H031818 (Cal. Ct. App. 2008) at 1-2.

1 The Sixth Amendment to the United States Constitution guarantees not only assistance,
2 but effective assistance, of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The
3 purpose of the right is to ensure a fair trial, and the benchmark for judging any claim of
4 ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the
5 adversarial process that the trial cannot be relied on as having produced a just result." Id. To
6 prevail on an ineffective assistance claim, a habeas petitioner must show that (1) counsel's
7 performance was "deficient," i.e., his "representation fell below an objective standard of
8 reasonableness" under prevailing professional norms, id. at 687-88, and (2) prejudice flowed
9 from counsel's performance, i.e., that there is a reasonable probability that, but for counsel's
10 errors, the result of the proceedings would have been different, see id. at 691-94.

11 "A court considering a claim of ineffective assistance must apply a 'strong presumption'
12 that counsel's representation was within the 'wide range' of reasonable professional assistance."
13 Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 787 (2011) (quoting Strickland, 466 U.S. at
14 689). The standards of both 28 U.S.C. § 2254(d) and Strickland are "highly deferential . . . and
15 when the two apply in tandem, review is doubly so." Id. at 788 (quotation and citations omitted).
16 When § 2254(d) applies, "the question is not whether counsel's actions were reasonable. The
17 question is whether there is any reasonable argument that counsel satisfied Strickland's
18 deferential standard." Id.

19 A difference of opinion as to trial tactics does not constitute denial of effective assistance,
20 United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1981), and tactical decisions are not
21 ineffective assistance simply because in retrospect better tactics are known to have been
22 available. Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir. 1984). Tactical decisions of trial
23 counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic
24 considerations; (2) counsel makes an informed decision based upon investigation; and (3) the
25 decision appears reasonable under the circumstances. Sanders v. Ratelle, 21 F.3d 1446, 1456
26 (9th Cir. 1994). Furthermore, trial counsel cannot be ineffective for failing to raise a meritless
27 motion. Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005); see, e.g., Hebner v. McGrath,

1 543 F.3d 1133, 1137 (9th Cir. 2008) (finding counsel's failure to object to admission of
2 defendant's prior sexual misconduct as propensity evidence not ineffective where evidence
3 would have been admitted to show common plan or intent).

4 1. Failure Adequately to Investigate

5 a. Jose Lopez

6 Aquino argues that counsel was ineffective for failing to investigate the fact that he was
7 “set up” by jailhouse informant Jose Lopez or that Lopez was the person who shot Felardo.

8 Lopez was a jailhouse informant who gave police information about Felardo’s shooting
9 that led to evidence that was admitted at Aquino’s trial. RT at 271. Lopez never testified at the
10 trial. At some point before the trial, Lopez fled to Mexico. RT 364. The jury knew, from
11 Officer Bertrand Milliken’s testimony about his interview with Aquino after Aquino’s arrest,
12 that Aquino thought that the informant was trying to frame him for the shooting of Felardo. RT
13 at 264. Aquino told Officer Milliken that the informant thought he had been arrested because of
14 information that Aquino had given to the police and the informant was trying to get him back.
15 Id. Counsel’s cross-examination of Officer Milliken elicited the information that the police
16 informant was Lopez. RT at 268. Counsel tried to continue questioning Officer Milliken about
17 Lopez, but the court sustained the prosecutor’s objection based on relevance. RT at 274. In a
18 sidebar conference out of the hearing of the jury, the court stated, “There is absolutely nothing
19 here that established enough connection between Sergio¹ and this incident to allow you to start
20 getting into third party culpability.” RT at 275.

21 A defense attorney has a general duty to make reasonable investigations or to make a
22 reasonable decision that makes particular investigations unnecessary. Strickland, 466 U.S. at
23 691; Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 1407 (2011). Strickland directs that “‘a
24 particular decision not to investigate must be directly assessed for reasonableness in all the
25 circumstances, applying a heavy measure of deference to counsel's judgments.” Silva v.
26 Woodford, 279 F.3d 825, 836 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 691). When

27
28 ¹Sergio is another name for Lopez. RT at 264.

1 defense counsel is aware of what a witness will say, a claim of failure to investigate that witness
2 cannot establish ineffective assistance. Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001),
3 amended 253 F.3d 1150 (9th Cir. 2001).

4 The Santa Clara Superior Court rejected this claim as follows:

5 Petitioner first claims that trial counsel failed to adequately investigate evidence
6 that Petitioner had been set up by the informant who told police that Petitioner was
7 the shooter and gave them Petitioner's cellular telephone number and license
8 plate. Petitioner sets out the history of conflicts that he had with the informant in
9 an attempt, seemingly, to establish the informant's motive to lie. However, the
10 informant was merely used by the police as a tool to uncover the evidence that
11 was admitted at trial, including the victim's identification of Petitioner. Thus, it
12 would have been improper for trial counsel to attempt to show that the informant
13 set Petitioner up since it would not undermine the evidence of Petitioner's guilt
14 that was brought before the jury.

15 Ex. 4, In re Aquino, No. CC503766 at 3-4.

16 Under both federal and California law, substantial evidence of third-party culpability
17 must link that third person directly with the actual commission of the offense before it can be
18 admitted at trial. Guam v. Ignacio, 10 F.3d 608, 615 (9th Cir. 1993) (evidence of third-party
19 culpability not admissible if it only presents a possible ground of suspicion, it must be coupled
20 with substantial evidence tending to directly connect that person with commission of the
21 offense); People v. McWhorter, 47 Cal. 4th 318, 367-68 (2009) ("In assessing an offer of proof
22 relating to such evidence, the court must decide whether the evidence could raise a reasonable
23 doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under
24 Evidence Code section 352.").

25 Although Aquino claims that counsel failed to investigate evidence that Lopez framed
26 him, from counsel's cross-examination of Officer Milliken, it is clear that she knew of Aquino's
27 theory that Lopez framed him and attempted to get before the jury evidence incriminating Lopez.
28 The fact that the evidence was ruled inadmissible by the court does not show counsel's
performance was deficient. Counsel attempted to do exactly what Aquino claims she did not
do. Furthermore, counsel cannot be faulted for not investigating what she already was aware of.
Bragg, 242 F.3d at 1088. Therefore, counsel's performance in this regard was not deficient. The
California Superior Court's denial of this claim was not contrary to or an unreasonable

1 application of established federal law.

2 b. Failure to Interview and Call Witnesses Verifying Lopez’s Culpability

3 Aquino faults counsel for not calling Luis Diez to testify. Aquino claims that Diez would
4 have testified about Lopez’s framing Aquino, but that counsel refused to call Diez as a witness
5 “because she thought that Diaz looked like a ‘gang-banger’ and had a record.” Petition at 19.
6 According to Aquino, counsel also failed to interview Eric Leon, an inmate at the county jail,
7 who allegedly had information about Lopez’s set-up. The state Superior Court did not address
8 this claim; therefore, the Court reviews the record to determine if the state court’s denial of this
9 claim was an objectively unreasonable application of established federal law.

10 As discussed above, the trial court had made it clear that evidence of Lopez’s
11 involvement in the crime would not be admitted. The law required substantial evidence of
12 Lopez’s culpability before any evidence implicating Lopez would be admitted. Counsel’s
13 decisions not to interview Leon or to call Diez as a witness appear to be strategic decisions based
14 upon the law and the ruling of the trial court. Furthermore, a difference of opinion as to trial
15 tactics does not constitute deficient performance even if, in hindsight, a better decision would
16 have been preferable. See id. (when record shows counsel was well-informed, and defendant
17 fails to state what additional information would be gained by the discovery he claims was
18 necessary, an ineffective assistance claim fails). Therefore, the Court is satisfied that the state
19 court’s denial of this claim was not an objectively unreasonable application of federal law.

20 c. Failure to Interview Witness to Shooting

21 Aquino claims counsel failed to investigate the person who reported hearing a gunshot,
22 who “made a statement to the police identifying the truck and its passenger as it left the area.”
23 Petition at 20. However, Aquino does not identify which witness he wanted counsel to
24 investigate or what that person would say. The state Superior Court did not address this claim;
25 therefore, the Court reviews the record to determine if the state court’s denial of this claim was
26 objectively unreasonable.

27 Officer Craig Johnson testified that he responded to a call about a shooting at a specific
28

1 location but, when he arrived at the location, there was no evidence of a shooting and no person
2 to interview. RT at 46-47. Officer Johnson responded to a second call from a gas station about
3 two bloody men who stopped to fill up for gas. RT at 47. The gas station attendant gave a
4 description of the car the men drove and its license plate number. Id. Officer Johnson’s
5 testimony suggests that there was no witness to the shooting who could have provided
6 exculpatory evidence. See Bragg, 242 F.3d at 1088 (claim of failing to investigate was
7 speculative because petitioner failed to identify what witness would have said). Therefore, the
8 state court’s denial of this claim was not objectively unreasonable.

9 d. Prejudice

10 Furthermore, the state Superior Court found that the evidence of Aquino’s guilt would
11 not have been undermined by any evidence about Lopez. Although the state court’s finding was
12 conclusory, a review of the record confirms that Aquino has failed to establish prejudice under
13 Strickland.

14 Aquino emphasizes that no physical evidence linked him to the shooting because the gun
15 and blue truck were not found. RT at 364. Nevertheless, the prosecutor’s case against Aquino
16 was strong. Felardo, one of the victims, testified that Aquino was the person who shot him. RT
17 at 150, 155. The prosecutor asked Felardo, “Now it’s been about a year and a half since that
18 shooting. Has your mind changed? Has your memory faded? Do you recall now as you sit here
19 today who shot you?” RT at 150. Felardo responded, “I’ll never forget that for the rest of my
20 life.” Id. The prosecutor asked, “Who was the person who shot you that day at the
21 intersection?” Felardo responded, “Carlos.” Id. Felardo also identified Aquino sitting in the
22 courtroom as the person who shot him. RT at 155. Although defense counsel presented an
23 identification expert to undermine Felardo’s identification of Aquino, Felardo’s identification
24 remained strong evidence against Aquino because Felardo knew Aquino from his drug dealings
25 with him, had selected Aquino’s photograph from a photographic lineup two weeks after the
26 shooting and the shooting took place in the day time so Felardo was able to get a good look at
27 the person who shot him. RT at 46; 254.

1 The prosecutor’s case also included tapes of incriminating telephone calls that Aquino
2 made to family members from jail, in which he acknowledged culpability for the shooting, made
3 arrangements to fabricate an alibi and a bill of sale for the blue truck and made arrangements to
4 destroy evidence. RT at 333-64. Additionally, there was evidence that the blue pickup truck,
5 which matched the description of the truck that was driven by the shooter, was registered to
6 Rosa Laos, Aquino’s estranged wife. RT at 236-37. Although Laos testified that, sometime
7 before the shooting took place, she sold the truck to a person who responded to the “for sale”
8 sign she posted on the truck, she later admitted that she sold the truck to Lopez, who was known
9 to Aquino and to his sister, Teresa Aquino. RT at 215-19; 236-41; 314-16; 271-72; 420. Laos
10 had no documentation that she had sold the truck to Lopez, and the registration of the truck was
11 never transferred out of her name. RT at 218. Therefore, Laos’ credibility about the sale of the
12 truck was called into question.

13 Furthermore, Aquino’s alibi defense was weak. Aquino’s father, Javier Aquino, testified
14 that, on the day of the shooting, Aquino was working with him fixing up an apartment for a
15 company called University Group, LLC. RT at 452. However, the receipt that documented that
16 Aquino was working did not have his name on it nor the specific dates that the work was
17 performed. RT at 452, 456.

18 Because the prosecutor’s case against Aquino was strong, even if counsel was deficient
19 in failing to investigate or present evidence regarding the witnesses described above, there is no
20 reasonable probability that the result of the proceeding would have been different. Therefore,
21 the Superior Court’s conclusion that the evidence about Lopez “would not undermine the
22 evidence of Petitioner’s guilt that was brought before the jury” was not an unreasonable
23 determination of the facts in light of the evidence presented in the state court proceeding.

24 2. Failure to Prepare for Motion in Limine and to Object

25 Aquino claims that counsel was unprepared to argue her motion in limine to exclude his
26 taped jailhouse conversations and to make certain objections. The state Superior Court did not
27 address these claim; therefore, the Court reviews the record to determine if the state court’s
28

1 denial of them was objectively unreasonable.

2 The record reflects that counsel submitted a written motion in limine to exclude the tapes
3 of Aquino's telephone conversations. CT at 118-19; RT at 15-20. At a discussion regarding the
4 motions in limine, the court indicated that the tapes contained highly relevant and incriminating
5 material, but said it would consider counsel's motion further. RT at 19-20. After this
6 discussion, counsel filed a supplemental motion to exclude the tapes. CT at 135-39; RT at 35.
7 The court stated that it would review the authorities raised by counsel in her supplemental
8 motion and indicated that the prosecutor would have to lay the necessary foundation before the
9 tapes would be admitted. RT at 35. Aquino incorrectly characterizes the fact that counsel did
10 not argue her written motion as abandoning it. Petition at 20. The written motion was sufficient
11 to put counsel's arguments before the court. Even though the tapes were eventually admitted
12 into evidence, counsel cannot be faulted for not trying to have them excluded. Therefore,
13 counsel's performance was not deficient in this regard.

14 Aquino argues that counsel was ineffective for failing to object to the prejudicial effect
15 of having Felardo testify on a hospital bed and attached to respiratory devices. Petition at 21.
16 However, when Felardo was testifying, counsel asked the court to admonish the jury about being
17 influenced by sympathy for him. RT at 152. The court declined to give the admonition at that
18 time because it already had admonished the jury that morning and did not want to repeat it. RT
19 at 152; see RT at 40 ("Do not let bias, sympathy, prejudice or public opinion influence your
20 decision. "). Therefore, counsel's performance was not deficient because she requested the exact
21 instruction that Aquino argues she should have requested. Furthermore, Aquino cannot show
22 prejudice because it can be presumed that the jury followed the court's original instruction. See
23 Weeks v. Angelone, 528 U.S. 225, 234 (2000) (jury is presumed to follow its instructions).

24 Aquino also argues that counsel failed to object to the prosecutor's introduction of
25 evidence of the .380 magazine found in his vehicle. Petition at 21. He contends that, at the
26 hearing on the motions in limine, the court ruled that this evidence would be excluded.
27 However, the trial court did not exclude this evidence but instead waited to rule on its
28

1 admissibility to determine if the prosecutor could lay the necessary foundation for it. RT at 11-
2 12. Counsel did object when the prosecutor tried to elicit testimony regarding the .380 magazine
3 from Officer Milliken. RT at 257. The objection was overruled because the prosecutor had laid
4 the required foundation with Officer Johnson's testimony. RT at 79. Therefore, counsel's
5 performance was not deficient in this regard.

6 The Court's independent review of the record shows that the state court's denial of these
7 claims was not an objectively unreasonable application of established federal law.

8 3. Failure Adequately to Cross-Examine Prosecution Witnesses

9 Aquino argues that counsel was unprepared to cross-examine Felardo because she failed
10 to elicit testimony that he did not know Aquino's first name, never met Aquino, did not speak
11 Spanish and misidentified the clothes that Aquino wore when he identified Aquino in court and
12 she failed to investigate whether Felardo had vision problems. Aquino also argues that counsel
13 failed to challenge Officer Johnson's testimony concerning drug distribution in Santa Clara
14 County, ballistics evidence and Felardo's ability to nod his head during his interview with
15 Officer Johnson.

16 The state Superior Court denied this claim as follows:

17 Petitioner claims that trial counsel ineffectively cross-examined Felardo and did
18 not adequately challenge the expert testimony of Officer Johnson on the matter of
19 drug distribution in Santa Clara County. Once again, Petitioner has not
20 established prejudice. The inconsistencies pointed out in Felardo's testimony are
21 of limited probative value when compared to Felardo's testimony as a whole. In
22 addition, the majority of these inconsistencies related to Felardo's identification
23 of Petitioner as the assailant. Trial counsel significantly questioned the accuracy
24 of Felardo's identification and went so far as to call an expert in the field of
25 eyewitness identification. Despite trial counsel's efforts, the jury ultimately
26 accepted the evidence that Petitioner was the shooter, which included but was not
27 limited to Felardo's identification. Given the weight of the evidence, it is
28 implausible that the result of the trial would have been more favorable had trial
counsel asked the few additional questions suggested by Petitioner's claim.

With regards to the testimony of Officer Johnson, Petitioner has not established
that his testimony would have been excluded if trial counsel had objected as
Petitioner suggests. Finally, Petitioner cannot show that the result would have
been different even if Officer Johnson's testimony regarding the caliber of
handgun used in the shooting had been excluded since what type of gun was used
in the assault was of marginal relevance when compared to the bigger question of
who pulled the trigger. Given the substantial evidence identifying Petitioner as
the shooter, this court cannot say that the exclusion of Officer Johnson's testimony

1 on the caliber of gun used would undermine confidence in the jury's verdict.

2 Ex. 4, In re Aquino, No. CC503766 at 5-6.

3 In cross-examining Felardo, counsel brought out the following testimony: that he had
4 taken heroin three hours prior to the shooting, RT at 156; that he associated a blue pickup truck
5 with Aquino because, in the past, Aquino drove a blue pickup truck to their meetings, id.; that
6 the first time he ever mentioned Aquino threatening to shoot him if he stole from Aquino was
7 at the trial, he never had mentioned this to the police or at the preliminary hearing, RT at 156-57;
8 and that his memory of everything after he got shot was very foggy, RT at 157-58. Because
9 counsel effectively cross-examined Felardo, the fact that she did not ask him the specific
10 questions that Aquino suggests does not mean that her performance was deficient. See Mancuso
11 v. Olivarez, 292 F.3d 939, 955 (9th Cir. 2002) (petitioner's suggestions regarding how counsel
12 might have handled witness's cross-examination differently are insufficient to support claim of
13 ineffective assistance of counsel). Furthermore, as stated by the state court, Aquino has not
14 established prejudice; given the weight of the evidence identifying Aquino as the shooter, it is
15 not probable that the result of the trial would have been different had counsel asked Felardo the
16 questions Aquino suggests here.

17 In regard to Officer Johnson's testimony, Aquino fails to indicate how the testimony to
18 which he thinks counsel should have objected prejudiced his case. As indicated by the state
19 court, the evidence to which Aquino objects has marginal inculpatory value when compared to
20 the question of who shot Felardo. The state court reasonably concluded that Aquino failed to
21 establish prejudice due to any deficient performance on the part of counsel in her cross-
22 examination of Officer Johnson.

23 4. Failure to Object to Hearsay Testimony

24 Aquino argues that counsel should have made a hearsay objection to Officer Johnson's
25 testimony relating how he came to investigate Aquino for the crimes charged against him.
26 Aquino contends that Officer Johnson used this information to vouch for the truthfulness of his
27 results in determining that Aquino was the shooter. Petition at 24 (citing RT 310).

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The testimony to which Aquino objects is as follows:

Q: Did you have more information at that time [August 27, 2005 meeting with Felardo in hospital] as to the actual name of the suspect.

A: I have to refer for August 27, 2005. I need to refer to my report.

Q: Yes, please. To refresh your recollection.

A: August 27, 2005, yes. I had information – I had a name of the suspect at that date.

Q: You had a first and last name?

A: Yes, I did.

Q: How did you obtain this information?

A: I received an investigative lead from the jail.

Q: Did this person indicate to you the name of the person who was responsible for the shooting that occurred against Mr. Felardo?

A: Yes.

Q: And did he give you any other information such as a license plate number?

A: Yes, he did.

Q: And what was that license place number to?

A: It was to a white Ford Explorer.

Q: Did you take – what did you do with the information as far as the name of the person that may be involved?

A: I took that name and I ran it through our San Jose Police Department database and obtained a photograph of the suspect and all his information.

Defense Counsel: Objection, Your honor, goes against discovery order.

Court: The objection is sustained. The question and answer are ordered stricken beginning, “What did you do with that information?”

RT at 309-10.

The state Superior Court denied this claim as follows:

Petitioner complains that trial counsel did not object to Officer Johnson’s recitation of how he came to investigate Petitioner for the offenses in this case.

1 Petitioner’s claim lacks merit. Officer Johnson’s statement that the informant
2 gave him Petitioner’s name was not hearsay as it was not admitted for the truth of
3 the informant’s statement: that Petitioner was the assailant. Rather, the statement
4 was admitted to show why Officer Johnson’s investigation focused on Petitioner.

5 Ex. 4, In re Aquino, No. CC503766 at 6.

6 As indicated by the state court, Officer Johnson’s testimony was admitted to show how
7 the police investigation focused on Aquino, not to establish that Aquino was the perpetrator.
8 Evidence that is not admitted to prove the truth of the matter asserted is not hearsay. Fed. R.
9 Evid. 801(c). Aquino’s argument that this evidence was used to vouch for the truthfulness of
10 Officer Johnson’s results is without merit. Aquino’s name is not even mentioned in this part of
11 Officer Johnson’s testimony. Because Officer Johnson’s testimony was not hearsay, counsel
12 was not ineffective for failing to object on this basis. See Juan H, 408 F.3d at 1273 (counsel
13 cannot be faulted for failing to raise a meritless issue). Furthermore, counsel did object based
14 on the discovery order, and this objection was sustained by the court. This again shows that
15 counsel’s performance was not deficient. Therefore, the state court’s denial of this claim was
16 not unreasonable.

17 5. Failure to Object Based on Right to Confront Witnesses

18 Aquino argues that counsel should have objected based on his right to confront Chapa and
19 Lopez, “two of the most important witnesses in this case.” Petition at 24. He also argues that
20 counsel should have protested about the prosecution’s lack of diligence in securing these two
21 witnesses. The state court did not specifically address this claim; therefore, this Court
22 undertakes an independent review of the record.

23 Out-of-court statements by witnesses that are testimonial hearsay are barred under the
24 Confrontation Clause unless (1) the witness is unavailable, and (2) the defendant had a prior
25 opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 59 (2004).

26 Here, Crawford is not applicable because there were no testimonial out-of-court
27 statements made by these witnesses that were admitted into evidence. Further, the record shows
28 that both witnesses were unavailable. Lopez fled to Mexico, RT at 364, and Chapa disappeared
 after he left the hospital, RT at 233. There is no evidence that the government caused these

1 witnesses to be unavailable. Indeed, there is evidence that the police attempted to locate Chapa.
2 RT at 233. Because an objection based on Crawford or on the government's lack of diligence
3 in locating these witnesses would not have been sustained, counsel's performance was not
4 deficient for failing to object on this basis. The Court is satisfied, after an independent review
5 of the record, that the state court's denial of this claim was not an unreasonable application of
6 established federal authority.

7 6. Pressuring Aquino Not to Testify

8 Aquino argues that counsel persuaded him not to testify even though his testimony would
9 have explained that his statements in the taped jailhouse conversations, which the prosecution
10 used to show that he was trying to cover up evidence of this crime, had nothing to do with this
11 crime, but with drug evidence that he did not want the police to find. Aquino also wanted to
12 testify so that the jury would hear his theory that Lopez was the shooter.¹

13 The Strickland standard applies when a petitioner claims ineffective assistance of counsel
14 based on denying him his constitutional right to testify. Matylinsky v. Budge, 577 F.3d 1083,
15 1097 (9th Cir. 2009). Counsel's legal advice concerning the defendant's exercise of his right
16 to testify, absent coercion, does not constitute ineffective assistance, but rather discharges
17 counsel's ethical responsibility to inform the accused of the consequences of such a decision.
18 Lema v. United States, 987 F.2d 48, 52 (1st Cir. 1993). Where, on advice of counsel, a
19 defendant knowingly and voluntarily, if reluctantly, decides not to testify, no constitutional error
20 occurs. Id.

21 The facts regarding this claim are as follows. The trial court asked defense counsel if
22 Aquino intended to testify. RT at 469. Counsel replied that she still was not clear if Aquino
23 wanted to testify but, if he decided not to testify, she would ask the court to do a voir dire of his
24 decision. RT at 469-70. The court addressed Aquino, stating:

25 Mr. Aquino, I know I have said this to you at least twice before. The decision
26 about whether or not you take the stand and testify is your decision. It's your right

27 ¹The court had indicated that the evidence regarding Lopez's alleged culpability would be
28 admitted if Aquino testified. RT at 275.

1 to testify. It is your right not to put yourself on the stand and be subject to
2 questioning and cross examination by the district attorney. However you decide,
3 that decision will be abided by your attorney and this Court. But you must make
4 that decision. You have had several days. I know you have been talking with
5 your attorney about this and thinking it over. We can't further delay the
6 proceedings for purposes of you to make that decision. . . . I'm going to leave the
7 bench at this time. I'm going to come back at 9:30. And I'm going to ask you this
8 question again and then we are going to summon the jury.

9 RT at 470-71.

10 After a short break, the following colloquy took place:

11 Court: Ms. Dell, how do you wish to proceed?

12 Counsel: At this point I don't plan on calling any further witnesses other than my
13 client, if he chooses to testify.

14 Court: Mr. Aquino, what's your decision in that regard?

15 Counsel: It has been my recommendation that we let the case rest as it is.

16 Aquino: No.

17 Court: You don't want to testify?

18 Aquino: No.

19 Court: All right. Let's call for the jury.

20 RT at 471-72.

21 The state Superior Court denied this claim as follows:

22 Petitioner next contends that he informed trial counsel at the outset of trial that he
23 wanted to testify on his own behalf. According to Petitioner, it was only under
24 trial counsel's duress that he was "forced to forfeit his right to testify." Yet
25 Petitioner's claim is not supported by the record. The trial court addressed
26 Petitioner and told him that he "was the person who has the right to make the
27 decision whether to testify or to not testify." Shortly thereafter, the court asked
28 Petitioner if he wanted to testify and Petitioner said no. Based upon the record,
it appears that Petitioner's decision not to testify was not unduly influenced by
trial counsel. Thus, Petitioner's claim regarding his decision not to testify is
unsubstantiated and contradicted by the record.

Ex. 4, In re Aquino, No. CC503766 at 4.

The record shows that Aquino had many discussions with his counsel regarding the
consequences of his testifying. Although counsel advocated in favor of Aquino's not testifying,
both counsel and the court informed Aquino that whether he testified was his decision.
Therefore, when Aquino told the court that he had decided not to testify, he did so knowingly

1 and voluntarily. Thus, counsel's performance was not deficient on this basis. The state court's
2 denial of this claim was not an unreasonable application of federal law or an unreasonable
3 determination of the facts in light of the evidence presented in the state court proceeding.

4 7. Failing to Challenge Prosecutor's Alleged Intimidation Tactics

5 Aquino argues that counsel should have sought a hearing on the prosecutor's intimidation
6 tactic of threatening to prosecute certain defense witnesses if they lied on the witness stand.
7 Aquino submits a declaration from Rosa Laos, in which she states that the prosecutor told her
8 that, if she did not tell the truth, he would put her in jail and take custody of her son. Petition,
9 Ex. B. She states that, although she testified to the truth, she was uncomfortable on the witness
10 stand because she thought the prosecutor would take her son. Id. Aquino also submits the
11 declaration of Maria de Los Angeles Cadillo, who declares that she was present when the
12 prosecutor threatened Laos to frighten her into not testifying. Petition, Ex. B. Aquino contends
13 that counsel should have investigated the extent of the prosecutor's intimidation of Laos and
14 have made a request for admonition so as to preserve the claim for appeal. He also contends that
15 the prosecutor threatened to charge his father, brother and sister with destruction of property, but
16 acknowledges that counsel brought this to the attention of the court.

17 The state Superior Court denied this claim as follows:

18 Petitioner's next contention is that trial counsel was ineffective for failing to
19 challenge prosecutor's alleged misconduct of threatening to prosecute certain
20 defense witnesses if they lied on the witness stand. Even if this court were to
21 assume that the misconduct Petitioner alleges actually took place, Petitioner
cannot establish prejudice. The record reflects that trial counsel was able to set
forth Petitioner's defense unabated by any alleged misconduct.

22 Ex. 4, In re Aquino, No. CC503766 at 4-5.

23 The state court's denial of this claim was reasonable. First, counsel did bring to the
24 court's attention the possibility that the prosecutor might have intimidated Laos. RT at 204.
25 Therefore, counsel's performance was not deficient. Second, although Laos testified for the
26 prosecution, her testimony was mostly favorable to Aquino. Thus, Aquino cannot show
27 prejudice under Strickland because, assuming the prosecutor made the alleged statement and
28 counsel did not object, it is not reasonably probable that, but for counsel's failure to object, the

1 result of the proceeding would have been different.

2 Assuming Aquino is claiming ineffective assistance based on the prosecutor's alleged
3 intimidation of his father, brother and sister, the claim fails because counsel brought the
4 prosecutor's conduct to the court's attention, RT at 122-23, 204, and because the witnesses'
5 testimony was favorable to Aquino. RT at 166-73 (Javier Aquino); 418-21 (Teresa Aquino);
6 449-56 (Javier Aquino).²

7 In summary, the state court's denial of Aquino's ineffective assistance of counsel claims
8 was not contrary to or an unreasonable application of established federal authority and its
9 determination of the facts was not unreasonable in light of the evidence in the state court record.
10 Accordingly, habeas relief on the claim of ineffective assistance of counsel is denied.

11
12 **B. Prosecutorial Misconduct**

13 Aquino presents several grounds to support his claim that the prosecutor committed
14 misconduct.

15 A defendant's due process rights are violated when a prosecutor's misconduct renders a
16 trial "fundamentally unfair." Darden v. Wainwright, 477 U.S. 168, 181 (1986). Under Darden,
17 the first issue is whether the prosecutor's remarks were improper; if so, the next question is
18 whether such conduct infected the trial with unfairness. Tan v. Runnels, 413 F.3d 1101, 1112
19 (9th Cir. 2005). Factors which the court may take into account in determining whether
20 prosecutorial misconduct rises to the level of a due process violation are (1) the weight of the
21 evidence of guilt, see United States v. Young, 470 U.S. 1, 19 (1985); (2) whether the misconduct
22 was isolated or part of an ongoing pattern, see Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir.
23 1987); (3) whether the misconduct related to a critical part of the case, see Giglio v. United
24 States, 405 U.S. 150, 154 (1972); and (4) whether the prosecutor's comment misstated or
25 manipulated the evidence, see Darden, 477 U.S. at 182.

26
27
28

²The testimony of Aquino's brother, Omar Aquino, was stricken by the trial court. RT at 199.

1 1. Intimidation of Witnesses

2 Aquino argues that the prosecutor improperly threatened Laos and Aquino’s brother,
3 Omar Aquino, so that Laos felt uncomfortable as she was testifying and kept thinking the
4 prosecutor would take her son from her and Omar Aquino took the Fifth Amendment and his
5 forty-five minute testimony had to be stricken.

6 The state Superior Court denied this claim as follows:

7 Petitioner’s claim of prosecutorial misconduct rests upon the claim that the
8 prosecutor intimidated defense witnesses [This] claim fails.

9 First, the two witnesses who were allegedly intimidated by the prosecutor both
10 testified. While both now claim to have been nervous on the witness stand,
11 neither state that their testimony would have been materially different had they not
12 been intimidated. As such, even if this Court were to accept the truth of the
13 statements of Petitioner’s family members, Petitioner has not established that he
14 was prejudiced by any conduct of the prosecutor.

15 Ex. 4, In re Aquino, No. CC503766 at 6-7.

16 As discussed above, even if the prosecutor attempted to intimidate Laos and Omar
17 Aquino, they both testified. Laos’ testimony was favorable to the defense. RT at 205-24. Omar
18 Aquino invoked his right against self-incrimination not because the prosecution threatened or
19 intimidated him, but because he had to stop talking about his drug dealing and other criminal
20 activities. RT at 118-19. Before invoking his Fifth Amendment rights, Omar Aquino testified
21 that Aquino did maintenance work with his father. RT 97-102.

22 Because both witnesses testified in his favor, Aquino fails to establish prejudice. The
23 alleged misconduct did not infect the trial with unfairness because it was not part of a repeated
24 pattern, it did not misstate the evidence and, as discussed above, the evidence of guilt was strong.
25 Therefore, the state court’s denial of this claim was not unreasonable.

26 2. Improperly Called Laos a Liar During Closing Argument

27 Aquino argues that the prosecutor, during his closing argument, improperly called Laos
28 a liar. The state Superior Court did not address this claim; therefore, the Court undertakes an
independent review of the record to determine if the state court’s decision was an unreasonable
application of established federal law.

1 A prosecutor's statements, in closing argument, about a witness's credibility, are proper
2 if they are based on the evidence. United States v. Moreland, 622 F.3d 1147, 1161 (9th Cir.
3 2010).

4 During his closing argument, the prosecutor stated:

5 We know that Rosa Laos lied on the stand. You know that because – not just
6 because the character of her testimony, but you also know that because jailhouse
7 calls were intercepted, jailhouse calls between Carlos Aquino and his brother
8 instructing his brother to make sure Rosa gets her story straight before the cops
9 get out there. Make sure she tells the cops that we sold the truck three months
10 prior, sometime in June.

11 RT at 505.

12 The prosecutor's statement about Laos did not constitute misconduct because it was based
13 on the evidence before the jury. Therefore, the state court's denial of this claim was not
14 objectively unreasonable.

15 3. Failure to Secure Important Defense Witnesses

16 Aquino argues that the prosecutor committed misconduct by failing to secure the
17 attendance of Chapa and Lopez. The state Superior Court denied the claim regarding Lopez
18 stating, "[T]he informant was not a material witness to the case since the evidence that was
19 introduced against Petitioner came from independent sources."

20 As discussed above, there is no evidence that the prosecutor caused the disappearance of
21 Lopez or Chapa. To the contrary, there is evidence that the police attempted to find Chapa.
22 Therefore, this claim fails because Aquino has not shown any conduct on the part of the
23 prosecutor that can be construed to be misconduct. Furthermore, as indicated by the state court,
24 Lopez was not a material witness to the case, so that his absence was not prejudicial to Aquino.
25 The state court's denial of this claim was not unreasonable.

26 4. Asking Felardo Leading Questions

27 Aquino argues that the prosecutor improperly asked leading questions of Felardo, who
28 testified for the prosecution. The state Superior Court did not address this claim; therefore, the
Court undertakes an independent review of the record to determine if the state court's decision
was an unreasonable application of established federal authority.

1 Improper questioning of a witness by the prosecutor is not alone sufficient to warrant
2 reversal. Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998). Rather, the relevant inquiry on
3 habeas is that dictated by Darden, 477 U.S. at 181, i.e., whether the prosecutor's behavior so
4 infected the trial with unfairness as to make the resulting conviction a denial of due process.
5 Ortiz, 149 F.3d at 934. In considering whether the questioning deprived the defendant of a fair
6 trial, the witness' testimony should be viewed as a whole to determine the impact of the improper
7 questioning. Id. at 934-35. At times, leading questions are necessary to develop a witness's
8 testimony. United States v. Archdale, 229 F.3d 861, 866 (9th Cir. 2000).

9 The Court has reviewed the prosecutor's questioning of Felardo, RT at 123-54, and finds
10 nothing that would have caused Felardo to testify untruthfully or that would cause unfairness to
11 Aquino. Thus, the prosecutor's questions did not constitute misconduct and, even if they did,
12 Aquino has not shown that they caused him prejudice. Therefore, the state Superior Court's
13 denial of this claim was not objectively unreasonable.

14 In sum, the state Superior Court's denial of Aquino's claims was not contrary to or an
15 unreasonable application of established Supreme Court authority nor was it an unreasonable
16 determination of the facts in light of the evidence presented in the state court proceeding.
17 Furthermore, this Court's independent review of the record finds that the state court's denial of
18 the claims it did not specifically address was not an objectively unreasonable application of
19 established federal authority. Therefore, the petition for a writ of habeas corpus is denied.

20 21 C. Certificate of Appealability

22 A Certificate of Appealability is denied. See Rule 11(a) of the Rules Governing Section
23 2254 Cases. Aquino has not made "a substantial showing of the denial of a constitutional right."
24 28 U.S.C. § 2253(c)(2). Nor has Aquino demonstrated that "reasonable jurists would find the
25 district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel,
26 529 U.S. 473, 484 (2000). Aquino may not appeal the denial of a Certificate of Appealability
27 in this Court but may seek a certificate from the Court of Appeals under Rule 22 of the Federal
28

1 Rules of Appellate Procedure. See Rule 11(a) of the Rules Governing Section 2254 Cases.

2 The Clerk is directed to enter Judgment in favor of Respondent and against Aquino,
3 terminate any pending motions as moot and close the file.

4

5

CONCLUSION

6

7

For the foregoing reasons, the petition for writ of habeas corpus is denied. The clerk shall enter judgment and close the file.

8


IT IS SO ORDERED.

9

10

DATED: November 28, 2012

11



SUSAN ILLSTON
United States District Judge

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28